Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Appendix to
PETITION FOR WRIT OF CERTIORARI

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H2PP

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 01-1182

CRYSTAL LUEBBERS, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, APPELLANTS, VS. ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARK., INC., APPELLEES,	Opinion Delivered MAY - 9 2002 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT, NO. CIV 99-152 HON. JOHN ALEXANDER THOMAS JUDGE, APPEAL DISMISSED.

JIM HANNA, Associate Justice

Appellants Crystal Luebbers[1], Teresa Ballard, Kenisha Bryant, and Cheryl King appeal the Clark County Circuit Court's Order requiring them to post a $750,000 bond to stay the execution of a court-approved settlement between members of a class, to which appellants belong, and Appellee Advance America Cash Advance Centers of Arkansas, Inc., (Advance America).

This limited appeal is part of a larger class-action lawsuit between a class of approximately 19,000 members and Advance America, a check-cashing company. Appellants here are class members of the plaintiff class. Appellee Phyllis Garrett is a designated representative of the class. On July

[1] Although Crystal Luebbers is named as an appellant in this action, the trial court granted her motion to withdraw as a party of record in this matter on December 5, 2001.

18, 2001 the circuit court approved a settlement agreement between Advance America and the class through its representatives. Appellants disapproved of this settlement agreement, and their disapproval has spawned several appeals.

Appellants first filed a motion to intervene as separate parties in the class action, after the settlement was struck. The circuit court denied this motion. The appellants filed their first notice of appeal from this denial on August 10, 2001. This appeal was docketed as CA 01-1218. Appellants lodged a partial record in connection with this appeal.

Also on August 10, 2001, appellants filed a second notice of appeal, appealing the circuit court's order approving the settlement agreement. This appeal was docketed as CA 01-1190. On November 2, 2001, appellants lodged a complete record of proceedings with this court for this second appeal.

In response to the two notices of appeal filed on August 10, 2001, the class representatives filed a motion for appellants to post a supersedeas bond. The circuit court ordered hearing on the matter for September 5, 2001, and on September 11, 2001, the circuit court granted the motion to post bond and ordered the appellants to post the bond in the amount of $750,000. On September 20, 2001, appellants filed a third notice of appeal seeking appellate review of the bond requirement. This appeal is docketed as CA 01-1182. Appellants lodged a partial record for this third appeal. This is the subject of this current appeal before the court.

On October 3, 2001, the class representatives filed a motion to strike the September 20, 2001, notice of appeal in CA 01-1182, which dealt with the appeal of the order to post a supersedeas bond. On November 2, 2001, the class representatives filed a motion to show cause why the appellants here should not be held in contempt for failing to comply with the circuit court's order to post bond. The

motion to strike and the contempt issue were set for hearing the trial court on December 10, 2001. On December 5, 2001, the December 10, 2001, hearing was temporarily stayed by this court pending our decision on the appellants' petition for writ of prohibition requesting this court to prohibit the trial court from striking their notice of appeal from the settlement-approval order. We granted the appellants' petition for writ of prohibition on December 13, 2001.

On November 13, 2001, the appellants filed a petition for writ of prohibition or for certiorari to bar the circuit court from requiring a supersedeas bond. This petition was docketed as 01-1251. Three days later, on November 16, 2001, the appellants filed a second petition for writ of prohibition to bar the circuit court from striking their notice of appeal. This petition was docketed as 01-1268. On December 13, 2001, this court denied the appellants's [sic] petition for writ of certiorari to bar the circuit court from requiring a supersedeas bond, holding that because the circuit court's order to post the bond was entered prior to the filing of the appeals, the circuit court still maintained jurisdiction to enter such order. As such, this court determined that the record on its face did not indicate that the trial court was "wholly without jurisdiction," and a writ of certiorari was improper. This decision, however, did not reach the merits as to whether the circuit court could require appellants to post such a bond, the issue that is before us now. Also on December 13, 2001, this court granted the appellants's [sic] petition for writ of prohibition to prohibit the circuit court from dismissing their appeal from the circuit court's order approving the settlement. We determined that dismissal of an appeal is not a proper matter for the trial court, and the circuit court no longer had jurisdiction to act on the motion to dismiss because the records had been filed in the appeals.

Appellants now ask us to determine whether the trial court erred in granting the class representative's motion to

require appellants to post a supersedeas bond for a stay pending their appeal of the underlying orders approving the class-action settlement and denying appellants's [sic] motion to intervene.

On appeal, the appellants make three arguments. First, they argue that the trial court did not have the authority under Arkansas Rule of Civil Procedure 62(d) and Arkansas Rule of Appellate Procedure-Civil 8 to order them to post a supersedeas bond when they had not requested a stay pending appeal of the trial court's order approving the settlement between the class and Advance America. They note that we have no cases directly on point, but several federal courts have addressed this exact issue under Federal Rule of Civil Procedure 62(d) and have held that the trial court cannot require the posting of a bond when no stay has been requested. Second, appellants argue that the trial court cannot maintain a contempt action against them for failure to comply with the court's order to post the bond because the bond requirement may only follow the request of a stay, and no party has requested a stay in this action. Therefore, failure to comply with the posting of the order also cannot be reached. Third, appellants argue that if this court determines that the trial court acted within its authority to require the bond, the trial court abused its discretion in this case in ordering them to post a bond for $750,000. The appellants assert that they do not have the means to post that much for a bond, as evidenced by the fact they were part of a class of people who had to get payday advances from Advance America, resulting in this action in the first place. They argue that requiring a bond here would, in effect, be a denial of due process to people who cannot afford to appeal if the bond is required.

Advance America argues in response that the trial court had the authority to order the appellants to post the supersedeas bond because the trial court retained jurisdiction since the record had not been lodged in the

underlying appeal. It also asserts that these same arguments were made in the appellants's [sic] petition for writ of prohibition, and that this court denied the arguments then. Second, Advance America asserts that the trial court can hold appellants in contempt for failing to comply with an order of the court. Absent a supersedeas, a trial court retains jurisdiction to enforce its orders, and no supersedeas was filed here. Third, Advance America argues that the trial court did not err in requiring the appellants to post a bond because courts determine on a case-by-case basis the extent to which a judgment is in jeopardy and require sufficient security to protect that judgment. Fourth, Advance America argues that the appellants's [sic] appeal is premature because an order to post bond is not a final appealable order from which an appeal may be had. The trial court is still considering the matter after it held a show-cause hearing on January 14, 2002, and there is no indication as to whether the court will require, through a contempt order, the bond to be posted. Finally, Advance America argues that the appellants lack standing here because they have not been aggrieved by the order because they have not posted the bond to date. The class representative, too, filed a brief, arguing essentially the same matters as did Advance America in its points on appeal.

In looking at the merits of this issue, we determine that appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action. Rather, they are class-member objectors at this juncture. Their motion to intervene was denied by the trial court, and unless this court reverses that order in that upcoming appeal. Appellants will not be independent parties to this class action.

We are cognizant of the fact that in the class action, they are members of the plaintiff class. However, the general rule is that class members lack standing to appeal a decision approved by the class representatives. *Haberman v. Lisle*, 318

Ark. 177, 884 S.W. 2d 262 (1994) (citing *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992)[2]). However, in *Haberman* we stated:

> We point out, though, that an unsatisfied class member is not without alternatives. An unsatisfied class member's options are to move to intervene as of right, collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation, or he may opt out. *See Croyden*, 969 F.2d 675, 678. The rationale of the class action is to render manageable litigation involving numerous class members who would otherwise all have access to court via individual lawsuits. As was emphasized in *Croyden*, if each dissatisfied class member could appeal individually, litigation would be uncontrollable, and the purpose of class actions would be defeated.

Haberman, 318 Ark. at 180. Here, appellants did not opt out, nor did they file a lawsuit to challenge the adequacy of the class representation. Therefore, their only recourse was to attempt to intervene, which they have tried to do. The trial court, however, denied this motion, and appellants have appealed that decision, which they may do. *See Cupples Farms Partner v. Forrest City Prod. Credit*, 310 Ark. 597, 839 S.W.2d 187 (1992). However, until their intervention issue is decided, the appellants are not independent parties to this action, other

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[2] The Eighth Circuit Court of Appeals in *Croyden, supra*, determined that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal if they have not done so. *Croyden* relies in part on *Marino v. Ortiz*, 484 U.S. 301 (1988), in which the Supreme Court held that settlement objectors who were not class members, but who would have been affected by the settlement, could not appeal from the settlement order because they had not intervened and, thus, were not parties to the action. *Croyden* and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), in particular, have extended *Marino's* holding to apply to unnamed class members who have yet to successfully intervene, such as the appellants here.

than as class-member objectors who have no right to independently appeal the class settlement. Therefore, it follows that the appellants are not "parties" to the class-action proceeding and, as such, cannot appeal a ruling by the trial court on an order to post a bond. Because we dismiss this appeal due to the appellant's lack of standing, we do not reach any other issues in this appeal.

Appeal dismissed.

GLAZE, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS
Civil Division

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons — PLAINTIFF

VS. — CIV-99-152

ADVANCE AMERICA — DEFENDANT

ORDER

Came on for hearing on the 5th day of September, 2001, and the Plaintiffs appearing through counsel, Todd Turner and Dan Turner, and the Defendant, Advance America, appearing through Claire Hancock, and David G. Nixon, appearing as the attorney for Teresa Ballard, Kenisha Bryant, Cheryl King and Crystal Luebbers, and the Court having considered the pleadings filed and arguments of counsel, does hereby find as follows:

1. For good cause shown, the Objectors are hereby ordered to post a bond in the amount of $750,000 pending the appeal in this action and the Plaintiff's request for additional notice is denied.

IT IS SO ORDERED.
"s/John A. Thomas
HON. JOHN A. THOMAS
9/10/01

DATE

Clerk mail copies to:
Todd Turner, *esquire*
Claire Hancock, *esquire*
David Nixon, *esquire*

Filed for Record 11th
day of Sep. 2001 at
11:05 o'clock
PAMELA D. KING,
Circuit Clerk
By "s/Tanya E. Talbro
Deputy Clerk

APPENDIX C

SUPREME COURT OF ARKANSAS
No. 01-1190

TERESA BALLARD, ET AL., APPELLANTS, VS. ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., AND PHYLLIS GARRETT, APPELLEES,	Opinion Delivered JUL 05 2002 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT, NO. CIV 99-152 HON. JOHN ALEXANDER THOMAS JUDGE, DISMISSED.

W.H. "DUB" ARNOLD, Chief Justice

This appeal arises from an order of the Clark County Circuit Court approving a settlement of all possible claims against appellee Advance America, Cash Advance Centers of Arkansas, Inc., and all of its officers, shareholders, and sureties for cash in the amount of $750,000 and forgiveness of approximately $550,000 in checks it held that had been returned unpaid due to insufficient funds.

The case began as a class action usury suit that was filed by appellee, Phyllis Garrett, against appellee, Advance America Cash Advance Centers of Arkansas, Inc., on October 12, 1999. On April 9, 2001, a conditional settlement class was certified, and on May 2, 2001, a proposed settlement agreement was preliminarily approved, and notice was given to class members. This notice informed the members that a fairness hearing would be held on July 18,

2001, and that potential class members were given until June 30, 2001, to opt out of the class.

Appellants, Teresa Ballard, Cheryl King, and Kenisha Bryant, filed a motion seeking to intervene in the action on July 6, 2001. On July 16, 2001, a hearing was held on appellants' motion. On July 18, 2001, the trial court found that appellants' motion to intervene was untimely, that appellants' interest was adequately represented, and the trial court denied the motion to intervene.

On July 18, 2001, the previously scheduled fairness hearing was held. Following the fairness hearing, the settlement was approved and appellants' [sic] appealed from the trial court's denial of their motion to intervene. This court affirmed the trial court in *Ballard v. Garrett,* ____ Ark. _____S.W.3d ____ (June 20, 2002).

In that case, this court upheld the trial court's order that appellants' motion to intervene was filed after the litigation had progressed too far, and held that there was no abuse of discretion by the trial court. *Id.* We stated that appellants sat on their rights and waited until they were not satisfied with the way the litigation was progressing. *Id.* We concluded that the trial court did not abuse its discretion when it determined that the proceedings had advanced so far that apellants' motion to intervene was not timely. *Id.* Further, we found that allowing the intervention would have delayed the entry of the proposed settlement and would have delayed the class members' ability to collect their compensation. *Id.* Finally, in that case, we concluded that appellants did not have a valid reason for delaying the filing of their motion to intervene until fifteen months after the litigation had begun or two months after a proposed settlement had been reached. *Id.* Accordingly, we held that the trial court did not err in denying appellants' motion.

Therefore, in *Ballard v. Garrett*, we held that the trial court did not abuse its discretion when it found that appellants' motion to intervene was untimely. This court stated the trial court did not abuse its discretion because (1) appellants waited until the litigation had progressed too far before they filed their motion to intervene; (2) the granting of appellants' untimely motion would have caused the other parties to the litigation to suffer prejudice; and (3) appellants failed to provide a valid reason for their delay in filing their motion to intervene.

While *Ballard v. Garrett* was pending before this court, Teresa Ballard, Cheryl King, and Kenisha Bryant filed another appeal with this court, also from Clark County Circuit Court. In this appeal, appellant raised four points: (1) the trial court abused its discretion in finding that the settlement agreement was fair, reasonable, and adequate; (2) the trial court abused its discretion in naming Garrett as class representative and naming her attorneys as class counsel; (3) the trial court erred in admitting and excluding certain evidence; and (4) the trial court erred in quashing the appellants' subpoena on Advance America, denying them the right to cross-examine witnesses and refusing to allow them to review and argue from a plaintiff's sealed exhibit.

However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of

Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.

Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra*. Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement. *Haberman, supra*.

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman*.

Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants

willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman,* appellants have no standing; thus the appeal is dismissed.

Appeal dismissed.

GLAZE, J., not participating.

APPENDIX D

Leslie W. Steen
Clerk
Robin Horne
Chief Deputy Clerk
Melissa Fuller
Chief Deputy Clerk
Jeanne Matthews
Records Supervisor

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Bobby Jackson
Sue Clayton
Lynda Boone

June 13, 2002

David Glen Nixon
Paige E. Young
The Nixon Law Firm
2340 Green Acres Road, Suite 12
Fayetteville, AR 72703

RE: 01 01182. Crystal Luebbers et al. v. Phyllis Garrett et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Glaze, J., not participating."

Sincerely,

"s/Leslie W. Steen"
Leslie W. Steen, Clerk

LWS:jko

cc: Todd Martin Turner
Claire Shows Hancock
Robert M. Buell
Betty L. Clower, clerk
(CIV99-152)

APPENDIX E

TERESA BALLARD; Kenisha Bryant; Cheryl King; and Crystal Luebbers v. ADVANCE AMERICA, Cash Advance Centers of Arkansas, Inc.

01-1182 ___ S.W.3d ___

Supreme Court of Arkansas

Opinion delivered July 5, 2002

Motions - motion to amend appellants' petition for rehearing - denied. - The motion to amend appellants' petition for rehearing was denied pursuant to the recent decision of the supreme court in *Ballard v. Advance America*, 349 Ark. ___, ___ S.W. 3d ___ (2002).

Motion to Amend Appellants' Petition for Rehearing; denied.

The Nixon Law Firm, by: David G. Nixon and Paige E. Young, for appellants.

No response.

Per Curiam. The Motion to Amend Appellants' Petition for Rehearing is denied pursuant to the recent decision of this court in *Ballard, et al. v. Advance America,* ___, Ark. ___ S.W. 3d ___ (July 5, 2002), Supreme Court case number 01-1190.

Motion denied.

Glaze, J., not participating.

APPENDIX F

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member

of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.C.A. § 16-11-302

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 2. COURTS AND COURT OFFICERS

CHAPTER 11. SUPREME COURT

SUBCHAPTER 3. PROCEDURAL RULES

16-11-302 Pleading, practice, and procedure in civil cases.

(a) The Supreme Court of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any and all proceedings in civil cases in all courts in this state. However, the court shall not have the power to prescribe rules in conflict with laws of this state relating to stays and continuances of proceedings in suits in which a member of the General Assembly, an officer of the General Assembly, or a designated employee of the General Assembly is an attorney or a party in the proceeding.

(b) The rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by Arkansas Constitution, Article 2, § 7, as amended by Arkansas Constitution, Amendment 16.

(c) The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as authorized in this section may prescribe the times for, and manner of, taking appeals.

(d) The Supreme Court may fix the dates when these rules shall take effect and the extent to which they shall apply to proceedings then pending.

(e) All laws in effect on July 24, 1973, regarding pleading, practice, and procedure in civil proceedings in the courts of this state and those relating to the time and manner of taking appeals in civil proceedings shall remain in effect only until such time as the Supreme Court prescribes rules regarding them or until the laws are repealed or revised by legislative action.

(f) Nothing in this section, anything herein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules previously prescribed by the Supreme Court.

History. Acts 1973, No. 38, §§ 1-6; 1979, No. 333, § 2; 1981, No. 312, § 3; A.S.A. 1947, §§ 22-245 -- 22-249, 22-249n.

A.C.A. § 16-65-119

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 5. CIVIL PROCEDURE GENERALLY

CHAPTER 65. JUDGMENTS GENERALLY

SUBCHAPTER 1. GENERAL PROVISIONS

16-65-119 Reversal, modification, or vacation of judgment.

(a) A judgment rendered, or final order made, in the circuit or chancery court may be reversed, vacated, or modified, either by the Supreme Court or by the court in which the judgment was rendered, or order made.

(b) A judgment or final order may be reversed or modified by the Supreme Court for errors appearing in the record.

(c) The proceedings to obtain the reversal or modification shall be by appeal, prosecuted as prescribed by law.

History. Civil Code, §§ 566-568; C. & M. Dig., §§ 6285-6287; Pope's Dig., §§ 8241-8243; A.S.A. 1947, §§ 29-501 – 29-503.

RULES OF APPELLATE PROCEDURE - CIVIL

RULE 2. APPEALABLE MATTERS; PRIORITY

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the circuit court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;

3. An order which grants or refuses a new trial;

4. An order which strikes out an answer, or any part of an answer, or any pleading in an action;

5. An order which vacates or sustains an attachment or garnishment;

6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;

7. An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;

8. An order which disqualifies an attorney from further participation in the case;

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure;

10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;

11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure; and

12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all orders in probate cases, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

(c) Appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court.

1. In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

2. Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct review hearings.

3. In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P., Rule 54(b); and

(C) termination of parental rights.

(d) All final orders awarding custody are final appealable orders.

(e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence.

[Effective January 1, 1996; amended effective March 4, 1999; amended effective January 27, 2000; amended effective February 1, 2001; amended effective July 1, 2001.]

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

[Filed May 29, 2002]

CRYSTAL LUEBBERS, TERESA BALLARD, KENISHA BRYANT and CHERYL KING, — APPELLANTS

v. NO. 01-1182

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., — APPELLEES

APPELLANTS' PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, the Appellants herein, by and through THE NIXON LAW FIRM, their attorneys of record, and pursuant to Ark. S. Ct. R. 2-3 submit their Petition for Rehearing and request this Court to reconsider and set aside its May 9, 2002 Order dismissing this appeal, reinstate the same, and grant them such other and further relief to which they may be entitled.

Certificate of Counsel

I hereby certify, pursuant to Ark. S. Ct. R. 2-3(a), that this Petition for Rehearing is filed in good faith and not for purposes of delay.

Respectfully submitted:
"s/David G. Nixon"
David G. Nixon (ABA #88048)
Paige E. Young (ABA #99123)
THE NIXON LAW FIRM
2340 Green Acres Road,
Suite 12
Fayetteville, AR 72703
Phone: (501) 582-0020
Fax: (501) 582-0030

Attorneys for Teresa Ballard, Kenisha Bryant, and Cheryl King

Certificate of Service

I, David G. Nixon, do hereby certify that on the 28th day of May 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

Hon. John A. Thomas
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"s/David G. Nixon
David G Nixon

IN THE SUPREME COURT OF ARKANSAS

[Filed May 29, 2002]

TERESA BALLARD; KENISHA BRYANT; and CHERYL KING — APPELLANTS

v. — No. 01-1182

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., — APPELLEES

BRIEF IN SUPPORT OF PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, the Appellants herein, and submit this Brief in support of their Petition for Rehearing filed contemporaneously herewith:

I. The Court's May 9, 2002 Order Results in a Denial of Due Process

Under the due process clause of the Fourteenth Amendment to the United States Constitution, a person may not be deprived of property or liberty without due process of law.[1] In the instant case, this Court properly observed that the Appellants were not parties to the underlying litigation, had not been sued, and had not been served with service of process. As objectors only, if it is true that they have no standing to appeal from the Trial Court's order directing

[1] The Fourteenth Amendment has been made applicable to the states. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963)

them to file a supersedeas bond, it follows that the Trial Court did not have the jurisdiction over them to order them to post the bond in the first place.[2] To hold otherwise would deprive the Appellants of property and, potentially, liberty (if the Appellees' attempted contempt sanctions are imposed) without due process of law. In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990).

II. The Appellants Qualify for an Exception to the Haberman Standing Rule.

As this Court knows, the Appellants already sought, unsuccessfully, to challenge the subject matter jurisdiction of the Trial Court in this matter by way of a Petition for Writ of Prohibition in Case No.01-1251. This Court rejected that attempt "because the circuit court's order to post the bond was entered prior to the filing of the appeal, [therefore] the circuit court still maintained jurisdiction to enter such order." Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc., ---S.W.3d---, 2002 WL 937685 (May 09, 2002). That decision did not go to the issues raised in this appeal.

If the Trial Court did have jurisdiction to order the Appellants to post the supersedeas bond, this Court has long recognized an exception to the general rule that one must be a party in order to have standing to appeal. That exception exists where one has a pecuniary or liberty interst affected by the Trial Court's decision. Arkansas State Highway Commission v. Perrin, 240 Ark. 302, 305, 399 S.W.2d287, 289-90 (1966) ("No one is aggrieved except the [Highway] commission, and, whether technically a party or not in the County court, appellant certainly is the one affected by the court order. This court has long recognized the right of who feels aggrieved by an order of a court, to appeal to a higher

---

[2] Subject matter jurisdiction may be raised at any time, including for the first time appeal. Terry v. Lock, 343 Ark. 452, 37 S.W.3d 202 (2001).

tribunal.") In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990) (trial court's order directing witness to pay $10,000 toward care of ward exceeded its jurisdiction); Hodges v. Gray, 321 Ark. 7, 901 S.W.2d 1 (1995) (attorney for party permitted to appeal criminal contempt citation against him); Dootson v. State, 2000 WL 1745267 (Ark. App. 2000) (witness cited for contempt allowed to appeal).

The above exception should apply in the instant appeal. Appellants are not, by this appeal, seeking a review of the Trial Court's order approving the settlement, which affects them indirectly. If the Trial Court's Order directing the Appellants to post a $ 750,000.00 supersedeas bond was valid, it affected the Appellants' pecuniary interest directly - not vicariously as in Haberman v. Lisle, 318 Ark. 177 884 S.W.2d 262 (1994) - and justifies this Court's exercise of jurisdiction over their appeal from that Order.

This approach would be consistent with principles of standing enunciated under the Fourteenth Amendment to the United States Constitution, as well. If the Trial Court's Order was valid, it constituted a real impairment of the Appellants' property and/or liberty interests sufficient to give them standing to appeal. Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067 (1997) ("To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and '"actual or imminent."'"); Martin-Trigona v. Shiff, 702 F.2d 380 (2nd Cir. 1983) (trustees in bankruptcy had standing to appeal from order granting debtor's *habeas corpus* petition).

Alternatively, since this Court's May 9 Order depends on its finding that the intervention issue is still unresolved, the rationale of Mausolf v. Babbitt, 125 F.3d 661, 28 Envtl. L. Rep. 20,057 (8th Cir. 1997) would suggest holding the matter open until intervention is decided. The problem with adopting such an approach, however, is that if intervention

is ultimately denied, the standing and due process problems would still remain.

III. The Court's May 9, 2002 Order Results in a Denial of Equal Protection.

If the Trial Court had the requisite jurisdiction to order the Appellants to post the supersedeas bond and they are not allowed to appeal from that order, they are being denied equal protection under the Fourteenth Amendment to the United States Constitution. Once the State of Arkansas established an appellate procedure for non-parties who have been affected by an order of a trial court, denial of a right to appeal to one class of aggrieved parties violates their right to equal protection under the laws. *See*, Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." (Citations omitted.)); Williams v. Oklahoma City, 395 U.S. 458, 459, 89 S. Ct. 1818, 1819 23 L.Ed.2d 440 (1969) ('This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.")

In the instant case, if the Trial Court's order requiring them to post a $ 750,000 supersedeas bond is not subject to a writ of prohibition and is also not appealable, the Appellants life, liberty and property interests are being directly affected, but they are left with no recourse to this Court at all. This may not be the intended effect of the Court's May 9 Order, but - given the procedural history and posture of this case - that will be the result.

IV. Conclusion.

For all of the above reasons, the Appellants respectfully request this Court reconsider and set aside its May 9, 2002 Order dismissing this appeal, reinstate the same, and grant them such other and further relief to which they may be entitled.

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APPENDIX H

IN THE SUPREME COURT OF ARKANSAS

[Filed June 12, 2002]

TERESA BALLARD; KENISHA BRYANT; CHERYL KING; and CRYSTAL LUEBBERS — APPELLANTS

NO. 01-1182

PHYLLIS GARRETT, Individually, and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC. — APPELLEES

Motion to Amend Appellants' Petition for Rehearing

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, by the through their attorneys of record, **THE NIXON LAW FIRM**, and in support of their motion would show the Court as follows:

That currently pending before this Court is Appellants' Petition for Rehearing of this Court's opinion in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.* 2002 WL 937685 (Ark. 2002) (Appeal No. 01-1182).

That this Court dismissed Appellants' appeal because Appellants' motion to intervene had been denied by the trial court, had not yet been reversed by this Court, and consequently, "appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action." *Id.*

That this Court in its opinion in the case of *Haberman v. Lisle*, 318 Ark. 177, 884 S.W. 2d 262 (1994) relied on *Croyden*

Assoc. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992) for the premise that unnamed class members lack standing to appeal a decision approved by the class representatives.

That on June 10, 2002, the United States Supreme Court issued its opinion in *Devlin v. Scardelletti, et al.*, 536 U.S. _____(2002)[1] and determined that unnamed class members who have objected in a timely manner to approval of a class action settlement at the fairness hearing have the power to bring an appeal without first intervening, abrograting the "lack of standing" issue advanced by *Croyden* and *Haberman*. The U.S. Supreme Court's opinion is submitted contemporaneously with this motion.

That Appellants meet the test set forth in *Devlin v. Scardelletti, et al., id.* permitting them to appeal an adverse determination in the trial court.

That Appellants respectfully request leave to supplement their prior filing in this proceeding to bring to the attention of this Honorable Court this recent decision by the United States Supreme Court, which has a direct bearing upon the issues pending in this matter.

WHEREFORE, premises considered, the Petitioners Teresa Ballard, Kenisha Bryant, and Cheryl King respectfully request this Court to allow them to amend their Petition for Rehearing in SC 01-1182 in order to bring to the Court's attention the United States Supreme Court decision of *Devlin v. Scardelletti, et al.*, 536 U. S. ____(2002) which has a direct bearing on the issues before this Court and to grant them other and further relief to which they may be entitled.

---

[1] 2002 WL 1270617

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Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photo copy of the within and foregoing document, with exhibits, if any to be served on those persons shown below via U.S. First class Mail, to wit:

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IN THE SUPREME COURT OF ARKANSAS

[Filed June 12, 2002]

TERESA BALLARD;
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No. 01-1182

PHYLLIS GARRETT,
individually, and o/b/o
a class of similarly situated persons; and
ADVANCE AMERICA, CASH ADVANCE
CENTERS OF ARKANSAS, INC., APPELLEES

Brief in Support of Motion to Amend Appellants' Petition for Rehearing

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, and submit this Brief in support of their motion filed contemporaneously herewith:

1. Appellants are Parties for the Purposes of Appealing Approval of the Settlement.

Currently pending before this Court is Appellants' Petition for Rehearing of this Court's opinion in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.*, 2002 WL 937685 (Ark. 2002) (Appeal 01-1182). Appellants are unnamed class members who were denied their motion to intervene in the trial court and who had filed their notice of objections to the proposed settlement on July 6, 2001. Despite the objections entered during the fairness hearing of July 18, 2001, the trial court approved the settlement as it had been proposed. Appellants filed notice of appeal on the issues of intervention and settlement, whereupon the trial

court ordered objectors to post a $750,000 bond while the appeals were pending, resulting in the above styled appeal.

This Court dismissed Appellants' appeal and cited *Haberman v. Lisle*, 318 Ark. 177, 884 S.W. 2d 262 (1994) for the premise that unnamed class members lack standing to appeal a decision approved by the class representatives where Appellants' motion to intervene had been denied by the trial court. *Haberman* was an extension of the precedent set by the Eighth Circuit Court of Appeals in *Croyden Assoc. v. Alleco, Inc., 969 F. 2d 675 (8th Cir. 1992).* Appellants submit that a recent decision by the United States Supreme Court has abrogated the premise upon which *Croyden* and *Haberman* stand and amend their Petition for Rehearing to include the *Devlin, infra,* opinion.

In *Devlin v. Scardelletti, et al.*, 2002 WL 1270617, 536 U.S. ___ (June 10, 2002), the United States Supreme Court directly addressed the issue of whether a unnamed class member, whose motion to intervene was denied at the trial court, has the power to bring an appeal without first intervening. The Court found that, contrary to the position held by some circuits and embraced by *Croyden* and *Haberman*, the issue was not one of standing because appellant had not been successful in intervening, but rather whether the Appellant was a party for the purposes of appealing the settlement approval. The Devlin Court held that an unnamed class member who had timely objected to approval of a settlement at a fairness hearing has the power to bring an appeal without first intervening, abrogating the precedent of *Croyden* and *Haberman*.

Devlin is directly on point to the situation faced by Appellants. Appellants moved to intervene and were denied by the trial court. They filed timely objections and raised those objections at the fairness hearing. Therefore, Appellants have the power to bring an appeal without first

intervening. This Court should reconsider its reliance on *Haberman* and *Croyden* in light of the *Devlin* decision.

2. Conclusion

For all of the above reasons, Appellants request that they be allowed to amend their Petition for Rehearing to include the recent decision of the United States Supreme Court which has direct bearing upon the issues pending in this matter, and that this Court reconsider and set aside its May 9, 2002 Order dismissing this appeal, reinstate the same, and grant them such other and further relief to which they may be entitled.

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